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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1342

JOHN LEO, *Petitioner*,

v.

THE STATE OF NEW YORK, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, John Leo, prays that a writ of certiorari be issued to review the judgment of the Court of Appeals of the State of New York affirming an order of the Appellate Division, First Department, which had affirmed a judgment of the Supreme Court of the State of New York, Bronx County, dated March 1, 1965, convicting him of grand larceny in the first degree.

OPINION BELOW

The opinion of the New York Court of Appeals, at 23 N.Y. 2d 556 (1969), is reprinted herein as Appendix A.

JURISDICTION

The judgment of the New York Court of Appeals was entered on January 23, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

New York City Charter § 1123:

> If any . . . officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before . . . any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property . . . of the city . . . , or regarding the . . . official conduct of any officer or employee of the city . . . , on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such hearing or inquiry, his term or tenure of office or employment shall terminate . . . .

QUESTIONS PRESENTED

1. Whether the ruling of this Court in *Garrity* v. *New Jersey,* 385 U.S. 493 (1967) is retroactive in its application.

2. Whether the ruling of this Court in *Garrity* v. *New Jersey, supra,* applies when the statement obtained from the defendant is used by the state solely for impeachment purposes during cross-examination of the defendant at his trial.

3. Whether, in order for the ruling of this Court in *Garrity* v. *New Jersey, supra,* to be applicable, it is necessary that the police officer, at the time he makes the statement in question, be specifically advised that

the assertion of his Fifth Amendment rights will result in his dismissal from public employment.

4. Whether a violation of the Fifth Amendment of the type involved in *Garrity* v. *New Jersey, supra,* can ever be deemed harmless error pursuant to the rule announced in *Chapman* v. *California,* 386 U.S. 18 (1967), and, if so, whether it can be deemed harmless error when the prohibited statement is used to impeach the veracity of the defendant in a case where the crucial issue is his veracity.

STATEMENT OF THE CASE

In July of 1963, two hundred forty-seven refrigerators, the property of the City of New York, were delivered to a recently completed City housing project for installation. On two occasions in August, a total of twenty-six were found to have been stolen. Police questioning of two project guards, Frank Nuro and Sherman Baker, resulted in their confessions and their accusation that petitioner, then a New York City policeman, was their accomplice in the theft.

Petitioner was called to testify before a Bronx County grand jury investigating the theft. At the time of his testimony, as now, New York City Charter § 1123 read, in pertinent part, as follows:

> If any . . . officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before . . . any officer, board or body authorized to conduct any hearings or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property . . . of the city . . ., or regarding the . . . official conduct of any officer or employee of the city . . ., on the

> ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate . . . .

Petitioner testified and denied guilt of the crime of which he had been accused by the self-confessed thieves. In the secrecy of the grand jury room, however, he admitted to the state prosecutor that, although married, he had had a meritricious relationship with another woman. He was subsequently indicted for grand larceny in the first degree in connection with the theft of eighteen of the twenty-six refrigerators.

At the trial, the prosecution introduced, through the testimony of Nuro and Baker, sufficient evidence, if believed, to justify the jury in concluding that petitioner had participated in the thefts. The prosecutor did not, in his direct case, introduce any of the testimony given by petitioner before the grand jury.

Petitioner testified on his own behalf and categorically denied the testimony of Nuro and Baker that he had participated in the theft of the refrigerators (829). On cross-examination, the prosecutor sought to impeach petitioner by asking him whether, some time before, he had had an affair with a woman other than his wife. Although previously willing candidly to admit such an affair in the secret surroundings of the grand jury room, petitioner was apparently unwilling to make the same confession in an open court. His denial of the affair was thereupon challenged by the prosecutor who confronted petitioner with his grand jury testimony on the subject. Having stated at the trial that he was

positive that he had not gone out with this other woman prior to her marriage (853-54),[1] petitioner was confronted with his grand jury testimony that, "Me and her were going out before she got married." The prosecutor impeached petitioner by use of his grand jury testimony not only on this issue (860-61), but on other points more directly involving the merits of the case (836, 837, 869, 898-99).

At the close of the case—a case which pitted the word of petitioner against that of his two accusers—the jury found petitioner guilty of grand larceny in the first degree.

REASONS FOR GRANTING THE WRIT

This case deals with the rule announced in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), and presents four questions left undecided by that case which merit this Court's attention. The first is whether the *Garrity* rule is retroactive. The second is whether that rule applies to cases in which the police officer's statement is used against him solely upon cross-examination for purposes of impeachment. The third is whether, in order for the rule to apply, the police officer need be specifically told that his refusal to waive immunity will result in his dismissal. The fourth is whether a violation of the rule can ever be deemed harmless error and, if so, whether it can be so deemed when the statement is used to impeach the credibility of the defendant police officer in a case where his credibility is the crucial issue.

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[1] Unless otherwise indicated, page references herein are to the typewritten transcript of the trial filed as the record herein.

1. Retroactivity

This Court's decision in *Garrity* made no reference to the question of the retroactivity of the rule there announced, and few indeed are the cases which have dealt with that issue. The New York Court of Appeals specifically declined to rule upon the issue and it is submitted that many state and federal courts will either similarly decline to do so or will come to conflicting opinions until this Court has ruled. We suggest that this case presents an appropriate vehicle for such a ruling, and note that *Garrity's* companion case, *Spevak* v. *Klein*, 385 U.S. 511 (1967), has already been implicitly held by this Court to be retroactive. See *Zuckerman* v. *Greason*, 386 U.S. 15 (1967), which reversed an order of disbarment antedating *Spevak*.

2. The Use of the Statement Solely for Impeachment

In *Garrity*, the statement which the police officer gave in order to save his job was introduced against him during the prosecutor's direct case. Thus, this Court's condemnation of that use of the statement did not lay down any rule concerning the use of such a statement during cross-examination of its maker for the purpose of impeaching his credibility. That very fact gives prosecutors, both state and federal, ample opportunity to violate the *Garrity* rule during grand jury proceedings and to withhold use of the compelled statement during their direct case in the hope that they may use it either to impeach a defendant who dares testify on his own behalf or to dissuade from testifying a defendant who fears such an impeachment. Until this Court decides the question of whether a statement taken in violation of the *Garrity* rule may or may not be used for impeachment purposes, numerous defend-

ants who have been subjected prior to trial to the compulsion condemned by *Garrity* will be reluctant to exercise their right to give testimony in their own defense, fearing the effect of a cross-examination based upon such a statement. This Court has recently expressed its disapproval of the concept that a defendant may lawfully be influenced to give up one constitutional right in order to exercise another. See *Simmons* v. *United States*, 390 U.S. 377 (1968). Until this Court squarely decides the question, there are likely to be state and federal rulings in the lower courts that impeachment use of compelled statements is either permissible or, as the court below ruled, mere harmless error. This Court should not permit such a situation to exist longer than is necessary.

3. The Necessity of a Specific Warning

In *Garrity,* the police officer was specifically warned, prior to his testimony, that his failure to waive immunity would result in the automatic loss of his position. In the instant case, as noted by the New York Court of Appeals, no such warning was given, no such "Hobson's Choice" was presented to the petitioner. The very fact that New York's highest court made such a distinction between this case and *Garrity* provides ample reason for this Court to deal with that distinction. It is a distinction without a difference. The fact that a police officer's failure to waive immunity results in his discharge, although not susceptible of judicial notice, is surely well enough known to police officers to justify this Court in concluding that no ritual of a recitation of the notorious penalty need be given to the officer prior to his decision whether to waive immunity. This Court should take the opportunity to

rule that the giving of such a warning is not a *sine qua non* to the application of the *Garrity* rule, if only because the New York Court of Appeals hinted that it might be. Such hints are mischievous and should be refuted as quickly as possible, lest they multiply.

4. The Question of Harmless Error

The New York Court of Appeals held that if the use of petitioner's grand jury testimony to impeach him was error, it was harmless error.[2] Since this Court's decision in *Garrity* was based upon the proposition that the officer's grand jury testimony, given under threat of being dismissed from the force for failure to testify, was coerced, the issue is presented as to whether a violation of the *Garrity* rule can ever be deemed harmless error. See, e.g., *Lynumn* v. *Illinois,* 372 U.S. 528, 537 (1963) (the proposition that the error in admitting an involuntary confession "was a harmless one . . . is an impermissible doctrine."). In any event, if the harmless error doctrine is to have any real meaning, then this Court should review a holding, such as that involved here, that in a case depending upon the credibility of the petitioner, it was at most mere harmless error to confront him with his coerced grand jury testimony and thereby to show to the jury that his word was not to be trusted.

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[2] It should be noted, however, that the Court of Appeals did not cite the *Chapman* case, nor did it make the specific finding, required by *Chapman,* that the error was harmless "beyond a reasonable doubt."

CONCLUSION

For the foregoing reasons, the Writ should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

STATE OF NEW YORK COURT OF APPEALS

No. 258

THE PEOPLE ETC., *Respondent,*

v.

JOHN LEO, *Appellant.*

Opinion

SCILEPPI, J.:

In the latter part of July, 1963, 247 new General Electric refrigerators were delivered to a recently completed New York City Housing Authority project in the Bronx. On August 1, 1963, sixteen refrigerators were found missing and on August 26, another 10 could not be accounted for.

In December, 1963, the appellant, a New York City Police Officer was indicted with four other men on multiple counts including grand larceny in the first degree. The indictment was dismissed as to defendant Quatron and pleas of guilty to the misdemeanor of petit larceny were entered by defendants Baker and Nuro, who were the guards at the project when the refrigerators were first reported missing. Thereafter on November 18, 1964 the appellant and defendant Cuomo went on trial and were found guilty as charged. However, Justice Postel set aside the verdict as to Cuomo on the ground that the verdict was contrary to the law and the weight of the evidence, apparently because the prosecution had failed to establish the requisite corroboration as to Cuomo (section 399, Code of Crim. Proc.).

At the trial Nuro testified that late in July, 1963 Quatron told him that he wanted to take two of the refrigerators that had recently arrived at the project. Nuro allowed him to do so receiving from Quatron twenty dollars for

each refrigerator, a sum he split with Baker, the other guard at the project. Quatron told him that he would return with a good customer for the refrigerators.

Nuro further testified that late one afternoon, the following week, Quatron returned with two men who were identified by Nuro as the appellant and Cuomo. Appellant said that he wanted refrigerators and, having been told by Nuro that he could take some, promised that he would return that night. Later that night, Quatron, Cuomo, appellant and two others returned in a green truck bearing the words "Southern Boulevard Roofing", and took nine refrigerators, paying Nuro $180.00, a sum he split with Baker. Near the end of August, the appellant and Cuomo returned, took nine more refrigerators and gave Nuro another $180.00 which he again split with Baker.

Baker testified substantially to the same effect.

Having sufficiently established a theft by the testimony of those who had participated in it, the prosecution next sought to supply the required corroboration of the accomplices' testimony by calling the detective assigned to investigate the theft and two of the appellant's next door neighbors.

Detective Duffy testified that as a result of a conversation he had had with Nuro and Baker, his investigation led him to the Jericho Roofing Company. There he saw Cuomo and four green rack-type trucks. When questioned, Cuomo denied the thefts but stated that on one occasion he and the appellant had gone to the housing project in question to get scrap lumber needed for repairs of the appellant's house and that the guards there had allowed them to take some of the lumber. Detective Duffy also spoke to the appellant on the same day. He also denied any participation in the theft and gave substantially the same story Cuomo had given about having obtained some lumber for repairs on his house.

Franz Schmitt testified that he was appellant's next door neighbor and had known him for about three years. Sometime during the summer of 1963 appellant offered to sell him a refrigerator for $85.00, and told him that he could view the refrigerator on his (appellant's) porch. When asked if the refrigerator was new or used Schmitt responded: "It was used. The tag was still on it". He told appellant that he did not need one, but that he knew a neighbor who might. Appellant asked him to tell the neighbor about it because he would give anybody a break.

Rudolph Schmidt testified that he was the son-in-law of Franz Schmitt and lived with him in the house adjacent to that of appellant. During the summer of 1963, after a conversation with his father-in-law, he went to the porch of appellant's house and saw a taped refrigerator which he identified as a General Electric, although admitting that he noticed no brand name or other mark indicating its make.

Both Cuomo and the appellant took the stand in their own behalf and related substantially the same story as they told Detective Duffy.

Jerry Cuomo, a cousin of defendant Cuomo, testified that during July and August he twice loaned to Cuomo and the appellant a green truck. However, he stated that the truck bore the name "Jericho Roofing Corporation".*

This is substantially all of the relevant testimony given at the trial.

Justice Postel as part of his charge to the jury stated:

> "In order to convict the defendants . . . the jury must find beyond a reasonable doubt that the refrigerator seen on the porch by the son-in-law of the next door neighbor Schmitt was one of the refrigerators stolen from the [project]; and if there is any question in their minds whether it was so stolen from the

* Earlier Nuro had testified that the truck which took away the stolen refrigerators bore the name "Southern Boulevard Roofing".

> [project] then the jury must necessarily acquit both defendants."

The appellant argues that this portion of the court's charge to the jury specifically limited the evidence possibly supplying corroboration to the testimony of the son-in-law Schmitt and, therefore, all other evidence which might be used in determining the sufficiency of the corroboration cannot be considered because the charge of the court, whether right or wrong, became the law of the case (*People* v. *Roper,* 259 N.Y. 170; *People* v. *Klein,* 185 App. Div. 86).

This position is untenable.

The only reasonable interpretation that the jurors could have possibly given to the relevant portion of the charge was that the testimony of the son-in-law was a critical element of corroborration, however, they were not limited to his testimony alone. The charge was that they must believe that the refrigerator seen on the porch was one of those that had been stolen. The son-in-law never identified the refrigerator he had seen as a stolen refrigerator. Therefore, necessarily the jury had to rely on the testimony of others to arrive at their determination.

In *People* v. *Morhouse* (21 N.Y. 2d 66, 74) we stated:

> "As we indicated in *People* v. *Fiore* (12 N Y 2d 188, 201), the corroboration requirement of section 399 of the Code of Criminal Procedure is fully met when there is some nonaccomplice evidence 'fairly tending to connect the defendant with the commission of the crime' (quoting from *People* v. *Elliott,* 106 N.Y. 288, 292). The corroboration need not, as must circumstantial evidence, lead exclusively to the inference of the defendant's guilt. As this court has noted, even 'Matters in themselves of seeming indifference * * * may so harmonize with the accomplice's narrative as to have a tendency to furnish the necessary connection between the defendant and the crime' (*People* v. *Dixon,*

231 N.Y. 111, 116-117; see, also, *People* v. *Crum*, 272 N.Y. 348, 353-354; *People* v. *Malizia*, 4 N.Y. 2d 22, 27; *People* v. *Reddy*, 261 N.Y. 479, 484.)"

The non-accomplice testimony in the instant case (1) placed the appellant at the scene of the crime at approximately the time the refrigerators were first reported missing; (2) in a vehicle similar to the one described by the accomplices and (3) that the appellant was in possession of a refrigerator similar to those that had been taken from the project.

It is our opinion that this evidence sufficiently tended to connect the appellant with the commission of the crime so as to satisfy the requirements of section 399 of the Code of Criminal Procedure.

As a second argument the appellant, relying on *Garrity* v. *New Jersey* (*supra*), takes the position that the prosecutor's use of appellant's grand jury testimony violated defendant's rights under the Fifth Amendment.

Appellant testified before the grand jury under a waiver of immunity. The appellant argues that as a police officer he was required to do so or automatically lose his position (Art. I, Sec. 6 New York State Constitution, section 1123, New York City Charter) and, therefore, his testimony having been involuntarily given it was reversible error to permit the prosecutor to use it at the trial (*Garrity* v. *New Jersey, supra*).*

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* It should be noted that unlike *Garrity* and the cases following it the appellant was not *expressly* given the "Hobson's Choice" of either signing the waiver and testifying or suffer the consequence of immediate discharge. However, having assumed that even if *Garrity* is applicable the error was harmless, we do not reach the question of whether or not the mere existence of the relevant provisions granting the power to discharge were sufficiently coercive so as to render the appellant's statement involuntary.

* * * * * *

The appellant's trial terminated before the Supreme Court's decision in *Garrity* so that if we were to determine that the facts in the instant case fall within the rule enunciated in *Garrity*, we would necessarily have to reach the question of retroactivity. However, the fact that the grand jury testimony was used solely for purposes of impeachment, coupled with the appellant having explained away the inconsistencies in his testimony, leads to our conclusion that any error which might have resulted should be characterized as harmless (section 542, Code of Criminal Procedure), and, therefore, renders it unnecessary for us to reach the question of retroactivity (*People* v. *Breslin and Brennan*, 21 N Y 2d 712).

Accordingly, the judgment appealed from should be affirmed.